



WORKER RIGHTS CONSORTIUM

Making Global Corporations' Labor Rights Commitments Legally Enforceable: The Bangladesh Breakthrough

Benjamin Hensler & Jeremy Blasi

June 18, 2013

One of the most distinctive attributes of the recently signed Accord on Building and Fire Safety in Bangladesh (“Accord”) is that, unlike nearly all initiatives since the advent of global manufacturing to address the safety and wellbeing of supply chain workers, the agreement entails commitments by multinational enterprises that are legally enforceable.¹ This brief document outlines the agreement’s key elements and enforcement provisions, their significance in the current debate on global labor rights, and the objections to them that have been voiced by some apparel brands and retailers.

Elements of the Accord

Under the Accord, each signatory company has committed to do the following:

- Disclose its supplier factories in Bangladesh to recognized, independent fire safety experts and require these factories to submit to rigorous fire safety inspections led by these experts
- Accept public disclosure of all inspection reports of its supplier factories under the program
- Require all its suppliers to implement all repairs and renovations necessary to make their factories safe, as determined through the inspection process
- Pay suppliers prices sufficient to make it possible for them to afford the necessary repairs and renovations and to operate in a safe manner
- Require suppliers to allow worker representatives into their factories to educate workers about workplace safety and worker rights
- Cease doing business with any supplier that fails to comply with any of the above requirements

¹ A significant exception has been the incorporation, since 2000, by most major universities in the United States and Canada of supply chain labor standards in their trademark licensing contracts with major athletic apparel firms such as adidas and Nike. *See, e.g.* Collegiate Licensing Corporation, *Special Agreement regarding Labor Codes of Conduct* (rev. 2008), <http://www.workersrights.org/dsp/CLC%20Special%20Agreement%20regarding%20Labor%20Code%20of%20Conduct.pdf>.

Crucially, these commitments are not merely general statements of intent, but binding, contractually enforceable obligations. The Accord establishes a dispute resolution process, set out in its Article 5, with the following steps:

- (1) Disputes concerning implementation are first submitted to the seven-member oversight steering committee, which is comprised of three representatives chosen by the trade union signatories and three representatives chosen by the company signatories, with a representative of the ILO serving as a neutral chair.
- (2) Any decision of the steering committee may, at the request of either party, be appealed to a process of binding arbitration, governed by the rules of the United Nations Commission on International Trade Law, which is the standard procedure for international arbitrations. As set out in the Accord, an arbitrator's award may be enforced in a court of law of the domicile of the signatory party against whom enforcement is sought (e.g. an award against a German company may be enforced in a German court). Under the New York Convention, an international agreement which has been signed by the home country of every signatory company, domestic courts have a broad obligation to enforce foreign arbitration awards.²

Significance of Enforcement Provision

The commercial arbitration process provided for in the Accord is the same process relied upon by corporations around the world to enforce the commitments made to them in commercial contracts with their ordinary business partners. Indeed, many of the Accord's signatory brands and retailers routinely include similar language in the legally-binding contracts they make with suppliers, contractors, creditors, and consumers. Binding arbitration has become the dominant method of dispute resolution for agreements between companies, and in many countries (including the United States) between companies and labor unions, because it is cheaper and faster than resolving the merits of disputes in court, but at the same time provides an assurance of neutral, objective and expert adjudication, as well as straightforward legal enforceability.

While legally enforceable commitments subject to binding arbitration are commonplace in international commercial transactions, the Bangladesh Accord is a major breakthrough because it is the first initiative involving multiple brands and retailers in which the companies have made detailed, legally enforceable commitments to implement international labor rights protections.

Until now, all of the major multi-stakeholder initiatives operating in the apparel sector (e.g. Ethical Trading Initiative, Fair Labor Association, Social Accountability

² The New York Convention (formally the Convention on the Recognition and Enforcement of Foreign Arbitral Awards) places the burden of establishing the invalidity of an arbitral award on the party challenging enforcement. Under the New York Convention, an arbitrator's award may only be vacated for one of several narrow grounds, such as the incapacity of the parties at the time of the underlying agreement to submit disputes to arbitration, the violation of a party's fundamental right to participate in a proceeding, or the irregular composition of the arbitration tribunal. *See* Article V. For more information on the New York Convention, including a list of signatory states, visit <http://www.newyorkconvention.org>.

International, Global Social Compliance Programme) have involved purely voluntary commitments by participating companies. Under this voluntary compliance model, the most severe penalty a participating company may face for noncompliance with the program's requirements, including those related to worker safety, is being excluded from the program. Yet, except as a purely reputational matter, this is no sanction at all, as it merely excuses the company of its obligations and results in no protection for workers. Given these initiatives' inherent lack of accountability and failure to regulate the retailers' own buying practices (which have been widely-recognized as a contributing factor to unsafe factory operations), it is not surprising that this voluntary approach has failed to prevent disasters like the one at Rana Plaza.

By contrast, under the Bangladesh Accord, the failure by a company to adhere to its obligations may result in an adverse, binding arbitral award which may then be enforced by a court in the company's home country. Such an award could, for example, require the company to comply with its obligations to help pay for the installation of safety features such as emergency exits found necessary for one of its supplier factories to operate safely.

The significance of the enforcement provision is reflected in the statements of corporate entities that oppose the Accord. For example, in a recently released document attacking the program, the Brussels European Employees Relations Group (an affiliate of the Washington, D.C.-based HR Policy Association, an organization that represents major U.S. corporations on labor policy issues) and Morgan Lewis (an American law firm that represent employers in labor disputes and litigation) state:

The Accord is a development of some significance. For the first time, a number of multinational companies have signed with global trade union federations what looks like a legally binding agreement, enforceable through the courts, under which these companies commit to a range of measures aimed at transforming the working conditions at the premises of offshore suppliers who manufacture ready-made garments for them.³

Similarly, many U.S. brands and retailers have refused to sign the Accord on the sole ground that it contains commitments that are legally binding. For example, referring to the binding arbitration provision, the U.S. retailer Gap Inc. stated:

Gap Inc. is ready to sign on today with a modification to a single area – how disputes are resolved. This proposal is on the table right now with the parties involved. With this single change, this global, historic agreement can move forward with a group of all retailers, not just those based in Europe.⁴

³ Brussels European Employees Relations Group and Morgan Lewis, *The Accord on Fire and Building Safety in Bangladesh: An Analysis* (undated).

⁴ Gap: Bangladesh Update, May 13, 2013, <http://www.gapinc.com/content/gapinc/html/csr/bangladesh.html>.

Of course, Gap's implication that its reservations about the Accord are minor is more than a little disingenuous: the enforcement provision is one of the defining attributes of the agreement. Removing it, as Gap has demanded, would eliminate the feature most distinguishing the Accord from the litany of voluntary programs that have failed to protect workers' lives in Bangladesh. In its place, Gap proposed that the only remedy for noncompliance with an arbitration order should be removal from the program, which—as noted American labor law professors James Brudney and Catherine Fisk recently emphasized⁵—merely amounts to relieving the company of any commitments it had made to protect workers—just as has been the case under the failed voluntary compliance programs.

Gap and Wal-Mart have since announced their intent to create a rival program in Bangladesh which apparently will contain no legal enforcement provision, a step for which they have been sharply criticized by worker safety advocates.⁶

Objections of Some Brands and Retailers to Enforceability Provisions

Apparel firms like Gap have claimed that their reluctance to sign the Accord is based primarily on the concern that signatory firms risk excessive undefined legal liability. The clearest evidence that these claims are exaggerated is, of course, the many leading global brands and retailers that *have* signed the Accord, including PVH (world's largest shirt-seller), H&M (largest global buyer from Bangladesh), Carrefour and Tesco (the second and third-largest retailers in the world), Inditex (world's largest fashion retailer, owner of "Zara" and many other brands). These are highly sophisticated global businesses and it is difficult to imagine that they would sign the Accord if doing so actually posed the type of liability risks that are being claimed by Gap and some other U.S apparel firms as an excuse for non-participation.

Firms like Gap have attempted to explain why they have refused to sign the Accord while so many other leading apparel brands and retailers have joined this initiative by citing the more litigious business environment in the United States as a basis for claiming that, as U.S.-based companies, they face a greater risk of legal liability if they sign the Accord.⁷ This claim ignores the fact that not only has New York-based PVH—which is, as noted, the largest seller of shirts in the world—signed the Accord, but so has leading U.S. retailer Abercrombie and Fitch, a key Gap competitor. It is also belied by the reality that some of the top European apparel firms that have signed the Accord, including H&M and Inditex, also both competitors with Gap, have substantial retail operations in the United States and are, therefore, similarly exposed to litigation in U.S. courts.

⁵ James Brudney and Catherine Fisk, *Wal-Mart, Gap Skirt the Issue*, L.A. TIMES (May 17, 2013), <http://articles.latimes.com/2013/may/17/opinion/la-oe-fisk-bangladesh-apparel-accord-20130517>.

⁶ Steven Greenhouse, *Gap and Wal-Mart Announce New Factory Safety Program*, N.Y. TIMES (May 30, 2013), <http://www.nytimes.com/2013/05/31/business/american-retailers-announce-new-effort-for-factory-safety-in-bangladesh.htm>.

⁷ Steven Greenhouse, *U.S. Retailers See Big Risk in Safety Plan for Factories in Bangladesh*, N.Y. TIMES (May 23, 2013), http://www.nytimes.com/2013/05/23/business/legal-experts-debate-us-retailers-risks-of-signing-bangladesh-accord.html?pagewanted=all&_r=0.

It is important to note in this regard that the Accord is, at base, simply a contract. In this sense, the risks assumed by signatory companies are no different than those to which these same firms willingly expose themselves in the normal course of business in countries around the world, which routinely involves their entering into legally-binding agreements—with suppliers, contractors, creditors, and landowners, to name a few.

This point is significant because, while Gap and other companies that are critics of the Accord have asserted that under the U.S. litigation system signatory firms could face substantial legal liability, major plaintiff lawsuits against U.S. corporations (as opposed to commercial litigation between companies) do not frequently arise from claims that firms have violated a contract. Instead, such suits typically assert that a company has violated a law (a statutory claim) and/or deliberately or negligently caused harm to one or more persons (a tort claim).

Neither circumstance is likely in this case: First, international apparel brands and retailers do not actually operate or own their own factories and, therefore, are not subject to either labor or building safety laws with regard to Bangladeshi garment workers. Second, it is implausible that a plaintiff could show that a brand or retailer had been negligently or deliberately harmful to workers in its operations in Bangladesh *because* it had joined an initiative to protect these workers' lives (if anything, the opposite is more likely—signing the Accord would help shield companies from such claims). In other words, while it is true that certain forms of plaintiff litigation do expose companies to risks of significant liability, joining the Accord does not make apparel firms more vulnerable to those kinds of lawsuits.

Conclusion

In sum, the inclusion of contractually enforceable obligations on brands and retailers in the Accord on Building and Fire Safety in Bangladesh is a major breakthrough for global labor rights. By putting teeth behind strong substantive commitments, the agreement holds the promise of finally addressing the worker safety crisis in Bangladesh. Contrary to the claims of its critics, however, it does not impose substantial risks of undefined legal liability on the signatory companies.